

Decision 99-10-004 October 7, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks.

Rulemaking 93-04-003
(Filed April 7, 1993)

Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks.

Investigation 93-04-002
(Filed April 7, 1993)

Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service.

Rulemaking 95-04-043
(Filed April 26, 1995)

Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service.

Investigation 95-04-044
(Filed April 26, 1995)

OPINION DENYING COMPENSATION

This decision denies the request of The Utility Reform Network (TURN) for an award of compensation for its contribution to Decision (D.) 98-12-069. TURN's request is denied on the basis that its presentation did not substantially assist the Commission in the making of its decision. However, the issues addressed in TURN's presentation will be considered in a future phase of this proceeding pertaining to Pub. Util. Code Section 709.2. (See D.98-12-069, p. 199.) TURN may renew its current request for compensation once there is a final decision in that phase.

Background

By D.98-12-069, we concluded a comprehensive seven-month review and analysis of Pacific Bell's (Pacific) Draft Application For Authority To Provide InterLATA Services in California (Draft 271 application.) Pacific's Draft 271 application represented a showing of its compliance with the 14 checklist requirements of Section 271 of the Federal Telecommunications Act of 1996 as of March 31, 1998.

A synopsis of the procedural history follows. On February 20, 1998, by Joint Ruling of the Coordinating Commissioner and the assigned Administrative Law Judge (ALJ), Pacific was directed to file a Notice of Intent to File a Section 271 Application (NOI) and a Draft Section 271 Application no less than 90 days before the company intended to file its application at the Federal Communications Commission (FCC). The Joint Ruling ordered the competitive local carriers (CLCs) and other interested parties to file comments on the NOI and draft application 30 days after Pacific filed these documents at the Commission. Pacific filed its NOI and draft application on March 31, 1998. On April 30, 1998, TURN and other parties filed comments on the NOI and the draft application. The Coordinating Commissioner and the assigned ALJ subsequently issued a joint ruling setting the ground rules and timeline for collaborative workshops. On July 10, 1998, staff issued its Initial Staff Report (ISR) identifying problems with Pacific's compliance with 11 of the 14 checklist requirements of Section 271. Workshops were subsequently held, following which staff prepared and distributed to participants notes memorializing the technical discussions and agreements reached over the five-week period. Parties submitted comments to staff on its notes. On October 5, 1998, staff filed its Final Staff Report (FSR). Parties were provided an opportunity to comment on the FSR. The Commission issued D.98-12-069 on December 23, 1998.

In D.98-12-069, we modified some of the recommendations of the FSR, established dates by when Pacific shall demonstrate that it has implemented the prescribed actions, and adopted the complete FSR as modified. We also adopted staff's recommendation that Pacific had shown evidence of compliance with four of the 14 checklist requirements. We set out goals for attaining compliance with not only the remaining 10 checklist items but also with Pacific's Operations Support Systems (OSS) and other multiple-issue items. Lastly, we set forth compliance process to address the remaining Section 271 checklist requirements.

By a request timely filed on February 22, 1999, TURN presents a claim for compensation for substantial contribution to D.98-12-069. Pacific filed a Response on March 24, 1999, opposing TURN's request. TURN filed a Reply to Pacific's Response on April 8, 1999.

Requirements for Awards of Compensation

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to Pub. Util. Code Sections 1801-1812. Pub. Util. Code Section 1804(a) requires an intervenor to file a NOI to claim compensation within 30 days of the PHC or by a date established by the Commission. The NOI must present information regarding the nature and extent of planned participation in the proceeding, and an itemized estimate of compensation that the customer expects to request. The NOI may also request a finding of eligibility.

Other code sections address requests for compensation filed after a Commission decision is issued. Pub. Util. Code Section 1804(c) requires an intervenor requesting compensation to provide "a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding." Pub. Util. Code Section 1802(h) states that "substantial contribution" means that,

“in the judgement of the commission, the customer’s presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer’s participation has resulted in a substantial contribution, even if the decision adopts that customer’s contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate’s fees, reasonable expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation.”

Pub. Util. Code Section 1804(e) requires the Commission to issue a decision which determines whether or not the customer has made a substantial contribution and the amount of compensation to be paid. The level of compensation must take into account the market rate paid to people with comparable training and experience who offer similar services, consistent with Pub. Util. Code Section 1806.

NOI to Claim Compensation and Request

The Commission held prehearing conferences in the 271 proceeding on July 15, 1998, and August 5, 1998. TURN did not file a NOI within 30 days of either of these prehearing conferences. Pacific argues in its Response that TURN’s request for compensation should be denied because TURN did not comply with Pub. Util. Code Section 1804(a).

Filing of an NOI within 30 days of the prehearing conference in the proceeding in which an intervenor intends to seek compensation is a clear prerequisite to filing a request for compensation under Pub. Util. Code Section 1804(c). However, TURN points out in its Reply that it has been found eligible for compensation in each of the consolidated dockets. TURN cites Rule 76.76 in support of its claim that it was not required to file a separate NOI in the proceeding on Pacific’s Draft 271 application. While the proceeding on the

Draft 271 application is not technically a phase of either consolidated docket, we find that TURN was reasonable in concluding that it was not required to file a separate NOI, given the complex procedural history of these dockets. We conclude that TURN substantially complied with the requirements of Pub. Util. Code Section 1804(a).

Within the allowed 60 days of the issuance of the decision, TURN filed its Request for an award of compensation. Therefore, TURN's Request was timely.

Contribution to Resolution of Issues

TURN's participation in this proceeding consisted of the filing of a response to the 271 application on April 30, 1999. This response was accompanied by affidavits of Charlotte F. TerKeurst (TerKeurst) and Thomas J. Long (Long). TURN also met with commissioners, advisors, and staff on the 271 issues that it briefed in this proceeding.

TURN's presentation focused on two issues. The first issue relates to the state of local competition in Pacific's service areas. In the affidavit of TerKeurst, criteria were presented to test whether and to what extent local competition exists in Pacific's service areas. TURN's consultant concluded that competition is practically non-existent in the California local exchange markets, and that significant competition is not likely to develop for quite some time. TURN argued that long distance authorization would not be in the public interest, and that Pacific's request to be allowed to provide interLATA services is premature and should be rejected at this time.

The second issue addressed by TURN is Pacific's record of compliance with service quality regulations of the Commission. In the affidavit of Long, evidence is offered to show that with respect to service quality standards for retail services, Pacific adopted unreasonable interpretations of Commission performance standards and has presented inaccurate and misleading monitoring

data to the Commission. TURN asserts that the conduct alleged demonstrates that Pacific can be expected to be uncooperative in the development, interpretation, and enforcement of service quality standards for wholesale services, which TURN claims are essential to the development and sustainability of effective local competition. Accordingly, TURN argues that granting Pacific long distance authorization would not be in the public interest. TURN asks the Commission to recommend to the FCC that Pacific be denied entry into California long distance markets.

A. Substantial Contribution Standard (Pub. Util. Code Section 1802(h))

TURN argues that its contributions to D.98-12-069 were substantial and warrant an award of the full costs of participation. TURN appears to acknowledge that the decision does not adopt in whole or part any of its contentions or recommendations, as required by Pub. Util. Code Section 1802(h). However, TURN argues that a different standard should be applied because this is not a "typical case" in that the Commission's task is to develop a record and make recommendations to the FCC, which will make the final decision on Pacific's bid to enter long distance markets. TURN claims that given the scope and nature of the proceeding, TURN's compensation request should be judged "...primarily by whether or not our participation helped the Commission carry out its duty as an advisor and fact finder on issues relevant to long-distance entry by Pacific." (Request, p. 9.) TURN submits that under that standard its work is eligible for compensation. Pacific opposes TURN's request on the basis that the statutory requirements for compensation have not been met.

We agree with Pacific that TURN has not satisfied the substantial contribution test under Pub. Util. Code Section 1804(h). In D.98-12-069, the Commission does not address either of the issues raised by TURN. The issue of

the state of local competition was specifically deferred to a later date in the ISR. (See ISR, p. 79.) Accordingly, neither the FSR nor D.98-12-069 discuss the state of local competition. TURN's testimony on this issue is neither referenced nor relied upon in the decision. The issue of Pacific's service quality, addressed in Long's affidavit, was also not referenced or relied upon in D.98-12-069. As TURN itself notes in its Request, staff did not provide an analysis of the public interest requirement in the ISR, and no mention was made of Long's affidavit on Pacific's service quality. (Request, p. 7.) The issue was also not addressed in the FSR.

We reject TURN's suggestion that it should be granted an award of compensation because the Commissioners "appear to have relied upon" information provided by TURN. We find no such indication, and none is cited. Pub. Util. Code Section 1804(h) explicitly requires that for a finding of substantial contribution the customer's presentation must have been adopted in whole or in part in the Commission's decision. That did not occur in this proceeding. We reject TURN's contention that it should be awarded compensation because the information that it presented to the Commission can be provided to the FCC at a later date. Nor can compensation be awarded on the basis that TURN anticipated that the Commission's final decision would address the state of competition in California. Pub. Util. Code Section 1804(h) does not provide for compensation for providing information that is not relied upon, in whole or in part, by the Commission in arriving at its order or decision.

While we conclude that TURN did not make a substantial contribution to D.98-12-069, we note that the issues for which TURN seeks compensation will be considered in a future phase of this proceeding. We deferred our consideration of Pub. Util. Code Section 709.2 issues to a later phase of this proceeding in a Managing Commissioner's Ruling, dated February 21,

1997. As noted in that ruling, among the specific determinations that the Commission must make pursuant to Pub. Util. Code Section 709.2 is that there is not anticompetitive behavior by the local exchange company. In D.98-12-069, we indicate that as soon as practicable, the Assigned ALJ shall issue a ruling scoping the Pub. Util. Code Section 709.2 phase of the proceeding, and setting forth a procedural schedule for the deferred Pub. Util. Code Section 709.2 determination. TURN may renew its current request for compensation at the conclusion of that proceeding. In that request, TURN should restate its contention that it should be compensated for its participation in 1998 and its efforts in preparing its intervenor compensation request in 1999, because it participated on issues identified by the Commission in the Joint Managing Commissioner's and Administrative Law Judge's Ruling dated February 20, 1998. TURN is correct that the Ruling identified the state of local competition and whether granting Pacific's 271 application would be in the "public interest" as both being issues relevant to the Commission's inquiry. Our denial of TURN's request for compensation at the current time is based upon the fact that the issues on which it participated were deferred to a later date. We reach no conclusion at this time regarding the ultimate merits or ultimate value to the Commission of TURN's participation.

B. Compensation Under the Redwood Alliance Doctrine

TURN submits that if the Commission finds that it did not rely upon any of TURN's recommendations or contentions in arriving at D.98-12-069, TURN should nonetheless be fully compensated under the "Redwood Alliance Doctrine." The analysis of eligibility for compensation to which TURN refers was first set forth in D.89-09-103, the Diablo Canyon ratemaking proceeding. In that proceeding the Commission stated that in exceptional circumstances the Commission may find that a party has made a substantial contribution in the

absence of adoption of any of its recommendations. The Commission stated that for such a liberalized standard to apply exceptional factors must be present. These factors must include: (1) an extraordinarily complex proceeding, and (2) a case of unusual importance. An additional third factor was considered, namely the presence of a contested settlement and the desirability of ensuring intervenor input. The Redwood Alliance Doctrine was further refined in D.91-11-070 where the Commission stated that emphasis should be placed on the degree to which an intervenor contributed to the development of a full record.

It is TURN's contention that it qualifies for compensation under this standard because the proceeding is of considerable importance to the future of the telecommunications industry in California. TURN admits that the market analysis conducted by its consultant was not extraordinarily complex, or extraordinarily costly. However, TURN submits that it meets the first prong of the Redwood Alliance test because confidentiality concerns made it necessary for TURN to negotiate separate non-disclosure agreements with numerous CLECs, and compiling the data took considerable effort. Lastly, it argues that its market analysis contributed substantially to the development of a high quality record in this proceeding, thus meeting the third requirement under the Redwood Alliance test.

We disagree with TURN's contention that under the Redwood Alliance test it is eligible for compensation in this case. Both D.89-09-103 and D.91-11-070 were issued prior to the 1992 revisions to the intervenor compensation statutes. As we noted in D.93-10-074, and again in D.95-08-051, the exception created by the Redwood Alliance Doctrine was incorporated into the amendment to Pub. Util. Code Section 1802(h) that allows full compensation to an intervenor who makes a substantial contribution to a decision, even if the intervenor's positions are adopted only in part. In both D.93-10-074 and

D.95-08-051, TURN was awarded compensation for its contributions to the underlying proceedings. In D.93-10-074, the Commission noted that TURN contributed to the formal record in the underlying proceedings on multiple issues.

In D.95-08-051, the Commission noted that the underlying decision did not adopt many of the contentions of TURN, which the Commission observed is a "prime criterion" in the definition of substantial contribution. Nonetheless, TURN was awarded 75% of its claim for compensation because some positions were adopted, and where its positions were not adopted, TURN's participation was useful in focusing the decision on potential problems and competing decisions. In contrast, in the instant case none of TURN's positions were adopted, nor did they provide any information that was relied upon and useful in focusing the issues decided in D.98-12-069. We note that even under the pre-1992 enunciation of the Redwood Alliance Doctrine in D.89-09-103, TURN would not be eligible for compensation because its participation did not make a substantial contribution to the outcome of the proceeding. We stated in D.89-09-103 that in certain exceptional circumstance an intervenor could be awarded compensation even where none of its recommendations were adopted, but only if the Commission found that a party made a substantial contribution.

Reasonableness of Requested Compensation

TURN requests intervenor compensation in the amount of \$56,520.21. Because TURN is not eligible for compensation at this time in this proceeding, we have not performed an analysis of the reasonableness of the requested compensation, the hourly rates claimed, and other miscellaneous costs. Our initial review did reveal, however, an inadequacy in the breakdown of consultant expenses which we bring to TURN's attention. In future requests for compensation, the itemization of consultant hours should be broken down by

task and issue. For example, the breakdown of time and expenses in Attachment A lists one consultant as billing 53.7 hours on April 30, 1998. There is no breakdown of hours and tasks. This billing does not provide sufficient level of detail to permit an analysis of the reasonableness of the hours claimed. In calculating an award for compensation, expenses itemized in this manner could be found to be an unjustified expense and deducted from a compensation award.

Comments on Draft Decision

Pursuant to Pub. Util. Code Section 1701.2, the Commission must provide a statement explaining changes from a proposed decision. In this case, our Decision modifies the Proposed Decision (PD) in several sections, but does not reverse its denial of an award of compensation at this time. We have made the following changes to the PD (all references are to the PD).

We have modified the introductory paragraph to add a statement that the issues addressed in TURN's presentation will be considered in a future phase of this proceeding pertaining to Pub. Util. Code Section 709.2. We indicate that TURN may renew its current request once there is a final decision in that phase.

The language indicating that we do not reach a determination as to whether TURN should have filed a separate NOI outlining its anticipated participation is deleted. We have substituted language indicating that we find that TURN substantially complied with the requirements of Pub. Util. Code Section 1804(a). (See section "NOI to Claim Compensation and Request.")

We have deleted the language in section "Substantial Contribution Standard" stating that TURN "...believed, albeit erroneously..." that the Commission's final decision would address the state of competition in California. We have substituted the word "anticipated." We have made this change to reflect the fact that TURN could reasonably have anticipated that the Commission

would consider the state of competition based upon the Joint Managing Commissioner's and Administrative Law Judge's Ruling dated February 20, 1998.

In the section "Substantial Contribution Standard," the procedure for TURN to seek compensation in the future for its efforts in this proceeding has been clarified. We have added language to specify that the issues for which TURN seeks compensation will be considered in a future phase on Pub. Util. Code Section 709.2 issues. We have noted that TURN may renew its request at the conclusion of that proceeding. These changes are intended to make it clear that TURN will have a future opportunity to seek compensation for its efforts in this proceeding. The changes are also made to clarify that the Commission acknowledges that the Joint Managing Commissioner's and Administrative Law Judge's Ruling dated February 20, 1998, identified as relevant the issues on which TURN participated.

We have added Finding of Fact 4 which states that TURN may seek compensation for its efforts in this proceeding at the conclusion of the Pub. Util. Code Section 709.2 phase of this proceeding.

We have modified the Conclusion of Law to add the words "at this time," to clarify that this Decision does not preclude a future award of compensation in the phase on Pub. Util. Code Section 709.2 issues.

Award

Because we conclude that TURN did not substantially assist the Commission in reaching its conclusions in D.98-12-069, we deny TURN's request for compensation for contributions to that decision.

Findings of Fact

1. TURN has made a timely request for compensation for its contribution to D.98-12-069.

2. TURN's participation focused on the issues of the state of local competition in Pacific's service areas, and Pacific's record of compliance with service quality regulations of the Commission. The state of local competition was deferred to a later date in the ISR, and is not discussed in D.98-12-069. Pacific's record of compliance with Commission service quality regulations is not referenced or relied upon in D.98-12-069.

3. We find that TURN's presentation did not substantially assist the Commission in arriving at D.98-98-069.

4. TURN may seek compensation for its participation in this proceeding at the conclusion of the phase of this proceeding related to Pub. Util. Code Section 709.2 issues.

Conclusion of Law

TURN is not entitled to compensation for its participation at this time because its presentation did not substantially assist the Commission in making its decision in D.98-12-069.

O R D E R

IT IS ORDERED that The Utility Reform Network's request for an award of compensation in the amount of \$56,520.21 for its contribution to Decision 98-12-069 is denied.

This order is effective today.

Dated October 7, 1999, at San Francisco, California.

RICHARD A. BILAS

President

HENRY M. DUQUE

JOSIAH L. NEEPER

JOEL Z. HYATT

CARL W. WOOD

Commissioners